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SUBJECT: COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTI-
NATIONAL ENTERPRISES (CIME) MEETING, MARCH 30-APRIL 1

REF: OECD PARIS 4811 (NOTAL)

1. AT LAST CIME MEETING, SEVERAL COUNTRIES WERE INVITED
TO CIRCULATE INFORMAL PAPERS IN ADVANCE OF NEXT CIME
MEETING TO HELP FOCUS DISCUSSION ON FOUR KEY SUBSTANTIVE
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ISSUES RELATING TO A POSSIBLE U.N. CODE FOR TNCS. FOLLOW-
ING IS INFORMAL U.S. ISSUES PAPER ON PERMANENT SOVEREIGNTY/
INTERNATIONAL LAW. U.S. DEL WILL CIRCULATE SUPPORTING
BACKGROUND PAPER ON THE EVOLUTION OF THIS ISSUE AT THE
CIME MEETING.

2. QUOTE ISSUE PAPER:

THE PRINCIPLE OF PERMANENT SOVEREIGNTY AND THE ROLE OF INTERNATIONAL LAW IN THE UN CODE OF CONDUCT FOR TRANS-NATIONAL CORPORATIONS

THIS LONG STANDING CONFLICT BETWEEN DEVELOPED AND DEVELOP-ING COUNTRIES OVER THE RELATED ISSUES OF PERMANENT SOVER-EIGNTY AND THE ROLE OF INTERNATIONAL LAW IS ONE OF THE

MOST INTRACTABLE ISSUES IN THE CODE OF CONDUCT EXERCISE. BOTH SIDES VIEW THEIR POSITION ON THIS QUESTION AS FUND-AMENTALLY NON-NEGOTIABLE.

IN OUR VIEW, IT IS ESSENTIAL THAT THE TRANSNATIONAL CORPORATION COMMISSION'S CODE OF CONDUCT NEITHER ECHO NOR REINFORCE THE DEFICIENCIES (E.G., EXTENSION OF A STATE'S RIGHT TO PERMANENT SOVEREIGNTY NOT ONLY OVER ITS NATURAL RESOURCES, BUT ALSO OVER ITS "WEALTH" AND "ECONOMIC ACTIVITIES", LACK OF RECOGNITION OF AN INVESTOR'S RIGHT TO MINIMUM STANDARDS OF EQUITABLE TREATMENT UNDER INTER-NATIONAL LAW) CONTAINED IN THE CERDS. AN AGREED CODE WHICH LENDS SUPPORT TO THOSE CONCEPTS WOULD HAVE UNFOR-TUNATE CONSEQUENCES:

(1) IT WOULD LEND THEORETICAL SUPPORT TO THE CONCEPT THAT THE CERDS PRINCIPLES DO, IN FACT, CONSTITUTE INTERNATIONAL LAW--FOR UNIVERSAL SUPPORT OF PRINCIPLES CAN BE CONSIDERED AS EVIDENCE OF CUSTOM;

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(2) MORE CONCRETELY, THIS WOULD PLACE FOREIGN INVESTORS ON NOTICE THAT LDCS ARE NOT INTERESTED IN ENSURING A FAVORABLE INVESTMENT CLIMATE; THAT THEIR PROPERTY MAY BE TAKEN WITHOUT COMPENSATION, IF NATIONAL LAW SO PROVIDES; AND THAT HOME STATES HAVE ABDICATED THEIR RESPONSIBILITIES TO PROTECT THEIR NATIONALS' FOREIGN INVESTMENT. SUCH PERCEPTIONS COULD RESULT IN A DECREASE IN FOREIGN INVEST-MENT, TO THE DETRIMENT OF HOME AND HOST COUNTRIES (ESPE-CIALLY THE LDCS).

IF WE ARE TO AVOID STALEMATE OVER THIS ISSUE, SOME WAY OF HANDLING IT WHICH PROTECTS POSITIONS ON BOTH SIDES MUST BE FOUND. SINCE THE POSITIONS OF GOVERNMENTS ARE WELL KNOWN ON THESE QUESTIONS THERE IS NO REQUIREMENT TO ADDRESS THEM EXPRESSLY IN THE CODE CONTEXT. THE DIFFI-CULTY IS THAT, GIVEN THE IMPORTANCE THAT SOME COUNTRIES ATTACH TO THE PERMANENT SOVEREIGNTY ISSUE IT IS UNLIKELY THAT THEY WOULD BE PREPARED TO PUT IT ASIDE. FURTHER, THOSE COUNTRIES, INCLUDING THE U.S., WHICH FIND INCLUSION

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

OF GOVERNMENT DUTIES AND RESPONSIBILITIES A SINE QUA NON
OF A CODE WOULD FIND IT DIFFICULT TO ACCEPT THE ABSENCE
OF ANY REFERENCE TO INTERNATIONAL LAW, EVEN IF THE PER-
MANENT SOVEREIGNTY POINT WERE DROPPED.

A WAY OUT OF THE IMPASSE IS TO TRY TO FIND SOME COMPROMISE
LANGUAGE WHICH COVERS THE POSITIONS ON BOTH SIDES. IN
THEORY, IT SHOULD BE POSSIBLE TO AGREE ON SOME GENERAL
REFERENCE TO THE REQUIREMENTS OF INTERNATIONAL LAW WHICH
LEAVES THE INDIVIDUAL STATES THE NECESSARY FLEXIBILITY TO

MAINTAIN DIFFERING VIEWS ON THE SPECIFIC CONTENT OF THOSE
REQUIREMENTS. IT IS DIFFICULT TO BE OPTIMISTIC, HOWEVER,
SINCE SUCH COMPROMISES WERE SOUGHT OVER A PERIOD OF TWO
YEARS DURING THE CERDS NEGOTIATIONS, BUT COULD NOT BE
FOUND. ON THE OTHER HAND, EARLY DISCUSSIONS OF THIS
ISSUE IN THE CONFERENCE ON INTERNATIONAL ECONOMIC COOPERA-
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TION (CIEC) GIVE SOME PROMISE OF FINDING AGREED COMPROMISE
LANGUAGE.

AS A RELATED MATTER, WE SHOULD SEEK TO FOCUS DISCUSSION
IN THE UN ON PROCEDURES FOR SETTLING DISPUTES THAT ARISE
BETWEEN INVESTORS AND GOVERNMENTS. THAT IS A CONTEXT IN
WHICH THE PERMANENT SOVEREIGNTY/INTERNATIONAL LAW ISSUE
BECOMES OPERATIVE. THUS, TO THE EXTENT WE CAN OBTAIN
AGREEMENT ON DISPUTE SETTLEMENT MECHANISMS WE WILL HAVE,
TO SOME EXTENT, DE-FUSED THIS CENTRAL ISSUE, MAKING SOME
FORM OF COMPROMISE MORE LIKELY. IN THAT REGARD, WE
SHOULD URGE THE USE OF INTERNATIONAL ARBITRATION FOR
SETTLING SUCH DISPUTES. WE COULD USEFULLY STRESS ADVAN-
TAGES OF THE WORLD BANK'S INTERNATIONAL CENTRE FOR THE
SETTLEMENT OF INVESTMENT DISPUTES (ICSID) AS AN APPRO-
PRIATE EXISTING MECHANISM FOR THIS PURPOSE. IT IS IN OUR
INTEREST TO DEAL PRAGMATICALLY WITH THE QUESTION OF HOW
DO WE RESOLVE DISPUTES, RATHER THAN DWELLING UNDULY ON
WELL KNOWN DIFFERENCES AMONG STATES ON THEIR VIEWS ON
SOVEREIGNTY AND INTERNATIONAL LAW.

WE MUST BE EXTREMELY CAREFUL IN DEALING WITH THESE ISSUES,
FOR WORDS AND PHRASES OFTEN CARRY THE ACCUMULATED WEIGHT
OF YEARS OF AGREED AND DISAGREED MEANINGS. THUS, THE
SIMPLE ASSERTION THAT "FOREIGN INVESTORS MUST OBEY THE
LAW OF THE HOST STATE" WOULD NOT, BY ITSELF AND UNMODIFIED
BY THE ASSERTION THAT GOVERNMENTS, IN REGULATING FOREIGN
INVESTMENT, ADHERE TO INTERNATIONAL LAW, BE ACCEPTABLE.
THE BARE PHRASE ALONE, UNLESS CLEARLY MODIFIED, OR INTER-
PRETED, COULD BE SEEN AS IMPLYING:

(1) THAT ONLY NATIONAL LAW IS RELEVANT TO THE EXCLUSION OF INTERNATIONAL LAW;

(2) THAT HOME GOVERNMENTS RECOGNIZE THE DUTY OF TNES TO OBEY EVEN LOCAL LAWS WHICH ARE IN CONTRAVENTION OF INTER-
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NATIONAL LAW, AND THAT HOME GOVERNMENTS WILL NOT PROTECT THEIR NATIONALS IN SUCH CIRCUMSTANCES; AND/OR;

(3) THAT NATIONAL LAW ALWAYS TAKES PRECEDENCE OVER THE EXTRA-TERRITORIAL APPLICATION OF HOME COUNTRY LAW TO ITS TNES. (WHILE THE U.S. RECOGNIZES THAT THE EXTRA-TERRI-TORIAL APPLICATION OF LAW MAY, IN PARTICULAR CASES, GIVE

RISE TO LEGAL AND/OR POLITICAL COMPLICATIONS, THE RIGHTS OF A COUNTRY TO REGULATE ITS ENTERPRISES, ON THE BASIS OF THE NATIONALITY OF THEIR OWNERS OR DIRECTORS, IS CLEAR IN INTERNATIONAL LAW AND HAS BEEN RECOGNIZED BY THE UN ITSELF IN A LEGAL OPINION).

IN SUMMARY, HOPE FOR PROGRESS LIES IN EITHER NOT DEALING WITH THIS ISSUE IN THE CODE CONTEXT OR FINDING SOME COMPROMISE FORMULA AGREEABLE TO BOTH SIDES WHICH PROTECTS THE ESTABLISHED POSITIONS OF GOVERNMENTS ON THIS ISSUE. BOTH POSSIBILITIES SHOULD BE EXPLORED, WHILE AT THE SAME TIME WE SEEK TO FOCUS DISCUSSION ON DISPUTE SETTLEMENT MECHANISMS SUCH AS INTERNATIONAL ARBITRATION. SHORT OF A BREAKTHROUGH ON ONE OF THOSE APPROACHES, WE WOULD BE LEFT WITH NO CHOICE BUT TO CONTINUE TO CARRY THIS FORWARD AS A BRACKETED DISAGREEMENT WHILE WE SEEK TO MAKE PROGRESS ON OTHER ELEMENTS IN THE CODE. SHOULD THAT PROVE NECESSARY, ONE CAN BE HOPEFUL THAT A TREND TOWARDS IMPROVING INVEST-MENT RELATIONS AMONG HOME AND HOST GOVERNMENTS AND MNES MAY RESULT IN THE ISSUE BEING MORE RIPE FOR PROGRESS FURTHER DOWN THE LINE. UNQUOTE.

3. ACTION ADDRESSEES SHOULD TRANSMIT PAPER TO APPROPRIATE OFFICIALS PREPARING FOR CIME MEETING.
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